87-72 (1)

No. .....

Supreme Court, U.S.
FILED
JUL 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1986

—o—

ROME RUTLEDGE,

Petitioner,

v.

RUTH RUTLEDGE,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

—o—

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QUESTIONS PRESENTED

I.

Whether it is a denial of due process or equal protection of the law under the United States Constitution for a State Supreme Court to refuse to apply a state constitutional provision expressly calling for a "twelve" man jury on the grounds that the United States Supreme Court had declared such a number of jurors was not required by the United States Constitution?

II.

Whether a citizen of a state is denied due process or equal protection by the refusal of a State Supreme Court to follow its own constitution when the violated provision of a state constitution had been approved by Congress as a condition of membership in the Union?

III.

When a state constitution affords its citizens greater rights than the United States Constitution, may those state constitutional rights be restricted or limited through an application of the lesser United States Constitutional rights?

LIST OF PARTIES

Rome Rutledge, petitioner

Ruth Rutledge, respondent

Pursuant to Rule 28.4 (c) the constitutionality of a State Statute is drawn into question and therefore 28 U.S.C. § 2403 (b) may be applicable. This petition for Writ of Certiorari is being served on the Attorney General of the State of Texas.

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REPORTS OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Second Supreme Judicial District of Texas is found at 709 S.W.2d 389. (See appendix, Exhibit A)

The Opinion on Motion for Rehearing of the Court of Appeals for the Second Supreme Judicial District of Texas is found at 711 S.W.2d 437. (See appendix, Exhibit B)

The Opinion on Second Motion for Rehearing of the Court of Appeals for the Second Judicial District of Texas is found at 720 S.W.2d 633. (See appendix, Exhibit C)

Petitioner's Third Motion for Rehearing was overruled without an opinion. (See appendix, Exhibit D)

Petitioner's application for Writ of Error to the Supreme Court of Texas was refused with the notation of no reversible error. (See appendix, Exhibit E)

Petitioner's Motion for Rehearing of his application for Writ of Error was overruled by the Supreme Court of Texas on April 8, 1987. (See appendix, Exhibit F)

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JURISDICTIONAL STATEMENTS

1. Judgment sought to be reviewed is the Opinion on Second Motion for Rehearing entered on October 16, 1986.

2. The Last Motion for Rehearing was made to the Supreme Court of Texas which overruled the Motion for Rehearing of Petitioner's Application for Writ of Error on April 8, 1987.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C. § 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Constitutional Provisions:

1. United States Constitution

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all Criminal Prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any crim-

inal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3: No person shall be a Senator or Representative in Congress, or elector of President and Vice-

President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each House, remove such disability.

Section 4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. Texas Constitution

ARTICLE 1 § 15 TEXAS CONSTITUTION

The right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense,

for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury.

ARTICLE 3 § 56 TEXAS CONSTITUTION

The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing:

The creation, extension or impairing of liens;

Regulating the affairs of counties, cities, towns, wards, or school districts;

Changing the names of persons or places;

Changing the venue in civil or criminal cases;

Authorizing the laying out, opening, altering, or maintaining of roads, highways, streets or alleys;

Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State;

Vacating roads, town plats, streets, or alleys;

Relating to cemeteries, grave-yards or public grounds not of the State;

Authorizing the adoption or legitimation of children;

Locating or changing county seats;

Incorporating cities, towns or villages, or changing their charters;

For the opening and conducting of elections, or fixing or changing the places of voting;

Granting divorces;

Creating offices or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts;

Changing the law of descent or succession;

Regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate;

Regulating the fees, or extending the powers and duties of aldermen, justices of the peace, magistrates or constables;

Regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes.

Fixing the rate of interest;

Affecting the estates of minors or persons under disability;

Remitting fines, penalties and forfeitures, and refunding moneys legally paid into the treasury;

Exempting property from taxation;

Regulating labor, trade, mining and manufacturing;

Declaring any named person of age;

Extending the time for the assessment or collection of taxes, or otherwise relieving any assesor or collector

of taxes from the due performance of his official duties, or his securities from liability;

Giving effect to informal or invalid wills or deeds;

Summoning or empanelling grand or petit juries;

For limitation of civil or criminal actions;

For incorporating railroads or other works of internal improvements;

And in all other cases where a general law can be made applicable, no local or special law shall be enacted; provided, that nothing herein contained shall be construed to prohibit the Legislature from passing special laws for the preservation of the game and fish of this State in certain localities.

ARTICLE 5 § 8 TEXAS CONSTITUTION

[The following is the wording of Article 5 § 8 at the time of trial in this case.]

The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections,

and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction.

The District Court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators guardians and minors under such regulations as may be prescribed by law. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate as may be provided by law.

The district court, concurrently with the county court, shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law. In any proceeding involving the general jurisdic-

tion of a probate court, including such specified proceedings, the district court shall also have all other jurisdiction conferred upon the district court by law. The legislature, however, shall have the power, by local or general law, Section 16 of Article 5 of this Constitution notwithstanding, to increase, diminish or eliminate the jurisdiction of either the district court or the county court in probate matters, and in cases of any such change of jurisdiction, the legislature shall also conform the jurisdiction of the other courts to such change. The legislature shall have the power to adopt rules governing the filing, distribution and transfer of all such cases and proceedings as between district courts, county courts, and other courts having jurisdiction thereof, and may provide that all appeals in such matters shall be to the court of (civil) appeals.

Amended November 6, 1973.

ARTICLE 5 § 13 TEXAS CONSTITUTION

Grand and petit jurors in the District Courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors, not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or

modify the rule authorizing less than the whole number of the jury to render a verdict.

ARTICLE 5 § 17 TEXAS CONSTITUTION

The County Court shall hold a term for civil business at least once in every two months, and shall dispose of probate business, either in term time or vacation as may be provided by law, and said Court shall hold a term for criminal business once in every month as may be provided by law. Prosecutions may be commenced in said court by information filed by the county attorney, or by affidavit, as may be provided by law. Grand juries empaneled in the District Courts shall enquire into misdemeanors, and all indictments therefor returned into the District Courts shall forthwith be certified to the County Courts or other inferior court, having jurisdiction to try them for trial; and if such indictment be quashed in the County, or other inferior court, the person charged, shall not be discharged if there is probable cause of guilt, but may be held by such court or magistrate to answer an information affidavit. A jury in the County Court shall consist of six men; but no jury shall be empanelled to try a civil case unless demanded by one of the parties, who shall pay such jury fee therefor, in advance, as may be prescribed by law, unless he makes affidavit that he is unable to pay the same.

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STATEMENT OF THE CASE

Material Facts:

This was a divorce case filed in the County Court at Law of Wichita County, Texas by Respondent, Ruth Rutledge. The County Court at Law of Wichita County is a legislatively created court, and its enabling statute is Article 1970-166d V.A.T.S. This statute specifically provides for a six person jury, Article 1970-166d § 7. Article 1970-166d purports to give the Wichita County Court at Law jurisdiction to hear divorce cases.

At the time of trial, in Texas the District Court had exclusive original jurisdiction over divorce cases. Texas Constitution Article 5 § 8. The Texas Constitution requires twelve person juries in district court cases. Texas Constitution Article 5 § 13.

In a case directly in point with the facts presented here the Texas Supreme Court in *Jordan v. Crudgington,* 231 S.W.2d 641 (Tex. 1950) found that a provision for only six jurors in divorce cases violates Article 1 § 15 of the Texas Constitution. In the *Jordan* case there was a severability clause contained in the *Jordan* Court enabling legislative statute which saved the remainder of the statute in *Jordan.* There is not presently and has never been a severability clause in Article 1970-166d V.A.T.S., which created the Wichita County Court at Law.

In an attempt to circumvent the unequivocal requirements of the Texas Constitution and prior case law the Court of Appeals turned to the United States Supreme Court cases of *Williams v. Florida,* 399 U.S. 78 (1970) and *Colgrove v. Baltin,* 413 U.S. 149 (1973) holding that six

person juries satisfied the sixth and seventh amendments to the United States Constitution, and the Court of Appeals concluded:

> Therefore, inasmuch as the United States Supreme Court has determined that the term "jury" does not necessarily connote a body of twelve members under the United States Constitution, (citing *Williams* and *Colgrove*), we find there is no Texas constitutional prohibition against the legislature providing that a county court at law may have a six person jury. Accordingly, we hold that the provision in section 7 (a) of Article 1970-166d for a six person jury does not violate the Texas Constitution.
>
> Quoting *Rutledge v. Rutledge,* 720 S.W.2d 633, 635 (1986).

In its application of its interpretation of the United States Constitution the Court of Appeals noted in its Opinion, on Second Motion for Rehearing, that there was no claim before the court that Article 1970-166d violates the United States Constitution. Nevertheless, the Court of Appeals ignored decades of Texas decisions involving judicial interpretation of the Texas Constitution and reached out to "determine if the meaning of the term 'jury' had changed since that time" [1950]. The history of constitutional construction in Texas is found in Chief Judge Onion's dissent reported in *Faulder v. Hill,* 612 S.W.2d 512 (Tex. Crim. App. 1980):

> "Turing (sic) to the rules of constitutional construction, it is observed that constitutional provisions which are not ambiguous and are not open to more than one construction or interpretation must be given their full effect without regard to the consequences. *Cramer v. Sheppard,* 140 Tex. 271, 167 S.W.2d 147 (1942); *Rawlins v. Drake,* 291 S.W.2d 349 (Tex. Civ. App.-Dallas 1956); *Bexar County Hospital District v. Crosby,* 320 S.W.2d 247, 253 (Tex. Civ. App.-San An-

tonio 1958); *Keller v. State,* 87 S.W. 669 (Tex. Cr. App. 1905); *Koy v. Schneider,* 110 Tex. 369, 218 S.W. 479, 221 S.W. 880 (1920), and constitutional provisions will not be construed to be ambiguous and contradictory if such construction is avoidable. *Holman v. Broadway Improvement Co.,* 300 S.W. 15 (Tex. Com. App. 1927), and when the signification of a phrase or clause is plainly discoverable from the words thereof, there is no reason to resort to rules of construction and effect should be given to the meaning thus ascertained. Words will be considered to have been used in their natural sense and ordinary significance unless the context indicates the contrary. 12 Tex. Jur. 2d, Constitutional Law, § 14, pp.362-363. The language used must be presumed to have been carefully selected and the words used are to be understood as people generally understood at the time of the adoption of the Constitution. *Cramer v. Sheppard,* 140 Tex. 271, 167 S.W.2d 147 (1942); *City of Amarillo v. Love,* 356 S.W.2d 325 (Tex. Civ. App.-Amarillo 1962), err. ref, n.r.e.; *Leander Ind. Sch. Dist. v. Cedar Park Water Sup. Corp.,* 479 S.W.2d 908 (Tex. 1972). See *Markowsky et al. v. Newman et al.,* 134 Tex. 440, 136 S.W.2d 808 (1940). And if a term appears to have received a judicial construction prior to its use in a constitutional provision, the inference is that it bears this signification. 12 Tex. Jur.2d, Constitutional Law, § 14, p.363; *Carr v. Tucker,* 42 Tex. 330 (1875).[4]

* * *

"A constitution should receive a consistent and uniform interpretation, so that it is not to be taken to mean one thing at one time and another thing at another time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable." 12 Tex. Jur.2d, Constitutional Law, § 17, p.365.

The primary rule of interpreting and construing the Constitution is to ascertain the intention of the people in adopting it and give effect to that intention. *Cox v. Robison,* 105 Tex. 426, 150 S.W. 1149 (1912);

Collingsworth County v. Allred, 120 Tex. 473, 40 S.W. 2d 13 (1931); *Ferguson v. Wilcox,* 119 Tex. 280, 28 S.W.2d 526 (1930); *Farrar v. Bd. of Trustees of Emp. Retirement System of Tex.,* 150 Tex. 572, 243 S.W.2d 688 (1951). The meaning of a Constitution is fixed when it is adopted and is not different at any subsequent time. *Cox v. Robison, supra; Jones v. Ross,* 141 Tex. 415, 173 S.W.2d 1022 (1943). And in interpreting the Constitution courts may look to the conditions existing at the time of adoption, general spirit of times, and prevailing sentiment, *Mumme v. Marrs,* 120 Tex. 383, 40 S.W.2d 31 (1931).

The courts, in construing the Constitution, must give effect to the intent of the people in adopting it as found in the instrument itself, and it will be presumed that the language thereof has been employed with sufficient precision to convey such intent, and where such presumption prevails nothing remains except to enforce such intent. *Holly v. State,* 14 Tex. App. 505 (1883).

* * *

It is not for courts to undertake to amend or rewrite the Constitution by judicial decision. *Rawlins v. Drake,* 291 S.W.2d 349, 350 (Tex. Civ. App.-Dallas 1956). Only the people can do that. *Moore v. Edna Hospt. Dist.,* 449 S.W.2d 508 (Tex. Civ. App.-Corpus Christi 1969), ref. n.r.e. Those called upon to construe the Constitution are not authorized to read into the Constitution language not contained therein or by construing the Constitution differently from its plain meaning, *Cramer v. Sheppard,* 140 Tex. 271, 167 S.W. 2d 147 (1942). Constitutional provisions may not be bent to meet a beneficent purpose however noble the design may be. *Ex Parte Smyth,* 56 Tex. Cr.R. 375, 120 S.W. 200 (1909). Courts are not to be concerned with the wisdom or lack of wisdom of a constitutional provision and need not exert their ingenuity to find reasons to thwart the intention of the people as clearly expressed in the Constitution, *Carpenter v. Sheppard,* 135 Tex. 413, 145 S.W.2d 562 (1940).[9]"

The Court of Appeals having found support for its desired result in the United States Constitution, proceeded to ignore 1) the Texas Constitutional[1] provisions for twelve person juries in district court and 2) the Texas Constitution[2] requirement that district courts in Texas have exclusive original jurisdiction of divorce cases and 3) the rules of Constitutional construction in Texas and 4) *stare decisis*, and applied the Sixth and Seventh Amendments of the United States Constitution to the Texas Constitution.

Manner of raising the federal questions:

Any question of federal law being involved in this case was first injected by the Court of Appeals in its Opinion on Second Motion for Rehearing.

Petitioner raised the following issues in his Third Motion for Rehearing:

POINT OF ERROR NO. ONE

The Court of Appeals erred in its Opinion on Second Motion for Rehearing in analyzing federal law on the question of a right to a specific number of jurors.

POINT OF ERROR NO. TWO

The Court of Appeals erred in its Opinion on Second Motion for Rehearing because the Texas Constitution affords greater rights to the Citizens of Texas on the subject of the number of jurors that the United States Constitution has been interpreted to provide.

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1 Article 5 § 17 Texas Constitution

2 Article 5 § 8 Texas Constitution

POINT OF ERROR NO. THREE

The Court of Appeals erred in its Opinion on Second Motion for Rehearing because while states may not restrict or lessen the rights afforded its citizens under the United States Constitution and Federal Law, the individual states may increase or grant its citizens greater rights than afforded by the Federal system and the United States Constitution.

POINT OF ERROR NO. FOUR

The Court of Appeals erred in its Opinion on Second Motion for Rehearing in not following traditional rules of Constitutional Construction and Stare Decisis.

These four points are the body of this Petition for Certiorari.

Petitioners Third Application for Rehearing was overruled without Opinion.

These issues were presented again in Petitioner's Application for Writ of Error to the Supreme Court of Texas.

Petitioner's Application for Writ of Error was refused with the notation "No Reversible Error".

On Motion for Rehearing of Petitioner's Application for Writ of Error to the Supreme Court of Texas, Petitioner presented the following:

POINT OF ERROR ON MOTION FOR REHEARING

Whether it is a denial of due process or equal protection of the law under the United States Constitution

for a State Supreme Court to refuse to apply a State Constitutional Provision expressly calling for a "twelve" man jury on the grounds that the United States Supreme Court had declared such a number of jurors was not required by the United States Constitution, or stated another way, is the citizen of a state denied due process or equal protection by the refusal of a State Supreme Court to follow its own Constitution when the violated provision of a State Constitution had been approved by Congress as a condition of membership in the union?

Petitioner's Motion for Rehearing was overruled without Opinion.

REASONS FOR GRANTING THE WRIT

1. Petitioner has a due process guarantee of federal protection of an interest expressly created by the Texas Constitution.

In discussing the concept of federal protection of an interest created by state law, and noting that cases raising such claims must be reviewed on a case by case basis, Professors Wright, Miller, Cooper and Gressman stated in 16 Federal Practice and Procedure section 4030 at page 758 that:

> Cases arising under the due process protection of interests in 'liberty' and 'property' provide the richest examples of special need for the Supreme Court to protect rights created by state law. To a large extent, federal law defines the area of protected liberty, and state law defines the area of protected property. Federal law may shape the concept of property, how-

ever, and state law may create liberty interests that would not otherwise exist.

State law may recognize liberty or property interests more extensive than those protected independently by the federal constitution. See, *Mills v. Rogus,* 457 U.S. 291 (1982). The interests protected attain constitutional status by virtue of the fact that they have been initially recognized and protected by state law. When the State seeks to remove or significantly alter that status the due process clause of the Fourteenth Amendment to the United States Constitution comes into play. See, *Wolff v. McDonnell,* 418 U.S. 539 (1974) and *Paul v. Davis,* 424 U.S. 693 (1976)

2. The incorporation by the Texas Court of the Sixth and Seventh Amendments to the United States Constitution and federal case law to deny petitioner's express rights under the Texas Constitution violated Petitioner's due process rights under the fourteenth amendment to the United States Constitution.

In the area of conflicts between state and federal constitutional law, the state law must yield to a more protective federal law. In this case there is no conflict embodied in a state constitution which gives its citizens greater rights in the area of entitlement to a specific number of jurors than the Sixth and Seventh Amendments to the United States Constitution does. And yet the petitioner has lost valuable state constitutional protections because the federal constitution and federal case law determinations are not as broad in this area as the state law.

There is only one court in the land that can declare that this state court decision which deprives Petitioner of his greater non-conflicting state constitutional rights cannot stand nor can Petitioner's state constitutional rights be diminished or abolished on the reasoning that the respective United States Constitutional rights are not as broad.

When the State Court utilized federal constitutional law to deprive Petitioner of his state constitutional rights, the door for review and relief from an erroneous application of law by the United States Supreme Court was opened. See, 16 Federal Practice and Procedure § 4031—State Incorporation of Federal Law pages 763-769 by Wright, Miller, Cooper and Gressman

3. Congressional approval of the Texas Constitution was a prerequisite to the admission of Texas into the union.

As Texas was not one of the original thirteen colonies, it was required to apply for admission to the union. One of the deprivations frequented on residents of the area which we now know as Texas was the denial of trial by jury. The Texas Declaration of Independence complains of the Mexican Government for denying a trial by jury in the strongest of terms declaring that Mexico "has failed and refused to secure, on a firm basis, the right of trial by jury, that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen." Source, interpretive commentary Vernon's Ann. Tex. Const. Article 1 Section 15. In part to better secure the full protections of court and jury the drafters of the Texas Constitution of 1845 set out in considerable detail and delib-

erate specificity the requirements of judiciary, courts and juries. Another major reason for such detail and attention being given was the necessity that the State Constitution be acceptable to the United States Congress as a condition for admission to the union.

When the state courts decide that express Texas constitutional protections are not to be given effect then this court should step in to assure that the original intent of the Congress in admitting Texas to the union is being satisfied.

Respectfully submitted,

BARBARA C. CRAMPTON
Bar Card No. 05004000
CRAMPTON, CRAMPTON & ESTRADA
505 Lamar Avenue
Wichita Falls, Texas 76301
(817) 723-9746

Attorneys for Petitioner

EXHIBIT A

Rome RUTLEDGE, Appellant.

v.

Ruth RUTLEDGE, Appellee.

No. 2-85-178-CV.

Court of Appeals of Texas.
Fort Worth.

May 15, 1986.

Husband appealed from judgment of the County Court at Law, Wichita County, Jim Hogan, J., dissolving his marriage and dividing parties' community estate. The Court of Appeals, Hill, J., held that: (1) trial court did not abuse its discretion by denying husband's motion for new trial alleging that wife fraudulently misrepresented to court existence and value of oil leases awarded to husband, and (2) trial court did not abuse its discretion in dividing estate unequally in favor of wife.

Affirmed.

Rehearing denied, 711 S.W.2d 437.

Crampton, Crampton & Estrada, Holly Crampton, Wichita Falls, for appellant.

Fillmore, Purtle, Spurgers & Briley, Stephen Briley, Wichita Falls, for appellee.

Before BURDOCK, HILL and HUGHES (Retired, Sitting by Assignment), JJ.

OPINION

HILL, Justice.

Rome Rutledge appeals from the judgment dissolving his marriage to Ruth Rutledge and dividing their community estate. In four points of error, Rome asserts that the trial court erred in not granting him a motion for new trial because of fraudulent misrepresentation made by Ruth at trial, and that the trial court abused its discretion in the division of the community estate by making an unequal division favorable to Ruth.

We affirm, because we find that the trial court did not abuse its discretion in denying Rome's motion for new trial, and because we find that the trial court did not abuse its discretion in the division of the community property.

In point of error number one, Rome urges that the trial court erred in not granting him a new trial because Ruth fraudulently misrepresented to the court the existence and value of the Holliday oil leases awarded to him. He specifically refers to the fact that he learned after the trial that Ruth had been told that if the leases were not pumped within 90 days that they could be lost. Roger Crampton, an attorney and the father of Rome's lawyer, testified at the hearing on the motion for new trial that he had examined the leases in question and that it was his opinion that the leases had all terminated, due to the fact that none of them contained an express cessation of production clause. He testified that he could have reached the same conclusion prior to trial if Rome had inquired.

The evidence at trial showed that Rome was a retired airline pilot who had been successful in oil and gas operations since approximately 1970. Ruth had not previously

handled any oil and gas endeavors. She had not worked outside the home since the marriage, except for duties she assumed at the couple's horse ranch.

One day after Ruth filed for divorce, Rome borrowed $200,000 from Parker Square Bank, pledging community certificates of deposit worth $200,000. He was served with citation three days later. The day after service, he wrote a check on the bank for $30,000 and withdrew $74,000 from a certificate and checking account at another bank. Rome had $230,000 plus of this money still in hand at trial. Later he had all the furniture from the ranch house put into storage and left for Las Vegas, Nevada. He did not tell Ruth about the funds, the furniture, or the fact that he was leaving for Las Vegas. He was gone approximately six weeks. While he was gone, Ruth was appointed community receiver of the community assets, including the leases in question. She was removed as receiver on December 3, 1984. Prior to leaving, Rome told the contract pumper to cease pumping the Holliday leases because of salt water leakage. In September, 1984, Ruth requested the pumper to start pumping the wells again provided it could be done safely. In December, 1984, Rome again requested that the wells be shut down because of salt water problems, and Ruth notified the pumper to do so. Trial on the merits was held April 2, 1985.

Ruth's expert testified at trial that the Holliday leases were worth $100,000. Rome testified that the leases, including equipment, were worth approximately $150,000.

Having reviewed all of the testimony, we do not find that the trial court abused its discretion by denying Rome's motion for new trial. The trial court could have reason-

ably concluded that under these circumstances Rome was in as good a position as Ruth to know that the leases could have terminated due to the cessation of production. In fact, the trial court could have concluded that Rome would know more about such matters than Ruth and that nothing prevented him from exercising the reasonable diligence required to make a more accurate assessment of the leases' value prior to trial. We overrule point of error number one.

In points of error numbers two, three or four, Rome urges that the trial court abused its discretion by dividing the estate unequally in favor of Ruth, and that there is no evidence or insufficient evidence to support the division.

[2, 3] The trial court has wide discretion in dividing the estate of the parties, and that division should be corrected on appeal only when an abuse of discretion has been shown. *Murff v. Murff,* 615 S.W.2d 696, 698 (Tex.1981). It is presumed that the trial court exercised its discretion properly. *Id.* at 699. The community property need not be equally divided. *Id.*

[4, 5] The trial court, in dividing the property, may take into consideration several factors such as the spouses' capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical condition and obligations, disparity of ages, size of separate estates, and the nature of the property. *Id.* The consideration of a disparity in earning capacities or incomes is proper and need not be limited by "necessitous" circumstances. *Id.*

Rome is in his late 60's. Since the 1970's he has been active in making the family's oil investments. Ruth, who

is in her late 40's, has a high school education and has not worked outside the home since their marriage.

Ruth acknowledged having a relationship with another man during the marriage. Although Ruth had not alleged any fault on the part of Rome, there was some testimony concerning his relationships with other women. He testified as follows:

> Q. Have you had numerous affairs with women after you were married?
>
> A. As I told you, no; and I'm a gentleman.

Another witness then testified:

> Q. Mr. Durbin, have you ever seen Rome Rutledge outside a bar embracing a woman not his wife?
>
> A. Yes.
>
> Q. Where?
>
> A. On Lamar Street, I believe it is.
>
> Q. And was he doing it in a gentlemanly fashion?
>
> A. Yeah.

[6] The trial court divided the property as follows:

Ruth	Values
Overriding royalty interests	Equal to active leases
Iowa Park Ranch	$450,000.00
Personal property from the ranch	7,871.00
Horses and equipment from the ranch	81,700.00
Cash	165,000.00
Miscellaneous personal property	Unknown
1983 El Dorado	24,000.00
	$728,571.00

Rome	Values
Active oil leases	Equal to overriding royalty interests
House at 2614 Bretton Road	$125,000.00
Personal property from house on Bretton Road	12,880.00
Oil field equipment	Unknown
Braniff retirement rights	Unknown
Two Honda motorcycles	500.00
Penrod and Crabtree notes	Less than $40,000.00
Two Model A automobiles	10,000.00
Cessna 310 aircraft	40,000.00
Glastron jet boat	10,000.00
Travel trailer	3,000.00
1983 silver Ford pickup	8,000.00
Two-horse trailer	1,000.00
Cash	164,500.00
Run checks	11,298.00
Miscellaneous personal property	Unknown
1984 Cadillac El Dorado	23,000.00
Cashier's check	74,000.00
	$483,178.00
	(total does not include the Penrod and Crabtree notes)

We do not find that the trial court abused its discretion in the division of the property. Rome relies on the case of *Erger v. Erger,* 590 S.W.2d 186 (Tex.Civ.App.—Fort Worth 1979, writ dism'd). In that case the court awarded the wife all of the residence, which was the couple's principal asset, and made a relatively equal distribution of the remaining property. This division resulted in the wife receiving a larger share of the property, despite the fact that she had a significantly larger separate estate and had a greater earning capacity than the husband. In the case at bar, there

is no evidence that Ruth Rutledge has any significant separate estate. Her husband appears to be capable of doing very well in his oil investments, whereas the evidence showed that Ruth had not worked during the marriage and had no marketable job skills. She testified she had been raised on a farm and felt that she could make money raising horses on the ranch which the trial court awarded to her. We overrule points of error numbers two, three and four.

The judgment is affirmed.

EXHIBIT B

Rome RUTLEDGE, Appellant,

v.

Ruth RUTLEDGE, Appellee.

No. 2-85-178-CV.

Court of Appeals of Texas,
Fort Worth.

June 26, 1986.

Rehearing Denied June 26, 1986.

Husband appealed from judgment of the County Court at Law, Wichita County, Jim Hogan, J., dissolving his marriage and dividing parties' community estate. The Court of Appeals, 709 S.W.2d 389, affirmed. On motion for rehearing, the Court of Appeals, Hill, J., held that county court at law's jurisdiction to enter divorce decree was not unconstitutional.

Motion denied.

Statutes 78

County court's jurisdiction to enter divorce decree under constitutional provision stating that legislature had authority to establish nondistrict courts with authority over divorce cases concurrent with that of district courts did not violate constitutional provision stating that legislature could not pass any local or special law granting divorces. Vernon's Ann.Texas Const. Art. 3, § 56; Art. 5, §§ 1, 8; Vernon's Ann.Texas Civ.St. art. 1970-166d.

Crampton, Crampton & Estrada and Holly Crampton, Wichita Falls, for appellant.

Fillmore, Purtle, Spurgers & Briley and Stephen Briley, Wichita Falls, for appellee.

Prior Report: 709 S.W.2d 389.

Before BURDOCK, HILL and HUGHES (Retired) (Sitting by designation), JJ.

OPINION ON MOTION FOR REHEARING

HILL, Justice.

Upon motion for rehearing, Rome Rutledge, the appellant, for the first time asserts that TEX.REV.CIV. STAT.ANN. art. 1970-166d (Vernon Supp.1986), the statute which confers divorce jurisdiction upon the County Court at Law of Wichita County (now County Court at Law No. 1 of Wichita County) is unconstitutional because it is in conflict with TEX. CONST. art. III, sec. 56 and art. V, sec. 8.

It has been held that under the authority of art. V, sec. 1 of the Texas Constitution, the legislature has the authority to establish nondistrict courts with authority over divorce cases concurrent with that of the district courts. *Jordan v. Crudgington,* 231 S.W.2d 641 (Tex. 1950). This rule has been applied to County Courts at Law. *Fleming v. Fleming,* 595 S.W.2d 199 (Tex.Civ.App. —Waco 1980, writ dism'd). Those cases discussed the issue as it might relate to Rome's claim under art. V, sec. 8.

Article III, sec. 56 of the Constitution provides that the legislature may not pass any local or special law grant-

ing divorces. The Supreme Court of Texas, in answering certified questions from this Court, held that the purpose of the provision is to ban the right of the legislature to grant a divorce to individuals by a special act. *Wood v. Wood,* 159 Tex. 350, 320 S.W.2d 807 (1959). In the case at bar, the Rutledges were divorced by the County Court at Law of Wichita County, not by the Texas Legislature. We therefore find no violation of art. III, sec. 56 of the Texas Constitution. We overrule points of error one through five of the motion for rehearing.

We also overrule the remaining points of error raised in the motion for rehearing for the reasons stated in our original opinion.

Appellant's motion for rehearing is denied.

EXHIBIT C

Rome RUTLEDGE, Appellant,

v.

Ruth RUTLEDGE, Appellee.

No. 2-85-178-CV.

Court of Appeals of Texas
Fort Worth

Oct. 16, 1986.

Husband appealed judgment of County Court at Law, Wichita County, Jim Hogan, J., dissolving marriage and dividing parties' assets. The Court of Appeals, 709 S.W.2d 389, affirmed and subsequently denied rehearing, 711 S.W.2d 437 and husband brought second motion for rehearing. The Court of Appeals, Hill, J., held that statute providing for jury of six in divorce case was not unconstitutional.

Motion for rehearing overruled.

Jury 31(2)

There is no state constitutional prohibition against the legislature's providing that a county court at law may have a six-person jury, so that divorce statute providing that jury shall be composed of six members did not violate State Constitution. Vernon's Ann.Texas Const. Art. 1, § 15; Vernon's Ann.Texas Civ.St. art. 1970-166d.

Crampton, Crampton & Estrada and Holly Crampton, Wichita Falls, for appellant.

Fillmore, Purtle, Spurgers & Briley and Stephen Briley, Wichita Falls, for appellee.

Prior reports: 709 S.W.2d 389, 711 S.W.2d 437.

Before BURDOCK, HILL and KELTNER, JJ.

OPINION ON SECOND MOTION FOR REHEARING

HILL, Justice.

Upon second motion for rehearing, appellant continues to assert that the County Court at Law at Wichita County never acquired jurisdiction over this divorce case because the statute creating that court, TEX.REV.CIV. STAT.ANN. art 1970-166d, (Vernon Pamph.Supp.1986), is violative of the Texas Constitution. Specifically, in his sole point of error, appellant now contends that because section 7(a) of article 1970-166d provides that the jury shall be composed of six members, and according to appellant, the Texas Constitution requires that a jury in a divorce case be composed of twelve jurors, section 7(a) is unconstitutional. Therefore, appellant claims that article 1970-166d is void in its entirety inasmuch as it contains no severability clause. Appellee has not chosen to brief this issue.

We overrule appellant's sole point of error.

Appellant relies upon the case of *Jordan v. Crudgington,* 149 Tex. 237, 231 S.W.2d 641 (1950), wherein the Supreme Court of Texas struck a provision in the statute in question (establishing a "Court of Domestic Relations in and for Potter County, Texas") which provided for a six-person jury in divorce cases. The Court found the provision to be in violation of TEX.CONST.art. I, sec. 15, and opined:

> The Act provides for a jury of six men. Our Constitution provides in Article I, Section 15, that 'The right of trial by jury shall remain inviolate'. The authorities are in general agreement that the meaning of the term 'jury' is a body of twelve members unless an express provision for a smaller number is contained in the Constitution. 31 Am.Jur., Jury, sec. 95; 35 C.J., Juries, sec 10, 50 C.J.S., Juries, sec. 7. Article V, Section 13, of the Constitution provides for juries of twelve men in the district court, and Section 17 of the same Article provides for a jury of six men in the county court. There is no provision in the Constitution expressly prescribing the number of jurors in a court established by the Legislature under the authority of the amendment of 1891. In the absence of such a provision *the conclusion is inescapable that the constitutional provision preserving the right of trial by jury requires that juries in courts of record, such as the court created by this Act, be composed of twelve men.* 31 Am.Jur., Jury, sec. 95. This ruling does not apply to justice and police courts. 31 Am.Jur., Jury, sec. 28; 50 C.J.S., Juries, sec. 77. Since the provision for a jury of six violates Article I, Section 15, of the Constitution, that provision is invalid.

Jordan, 231 S.W.2d at 646 (emphasis added). The Court concluded that since the statute contained a severability clause, the remainder of the statute was a valid exercise of the legislative power. *Id.* at 646-47.

As is evident, the *Jordan* court did not rely upon any case law for its conclusion that a jury in a legislatively created court must consist of twelve jurors. Rather, the authorities cited consist merely of three encyclopedic references: 31 AM.JUR. *Jury* sec. 95 (which reference material is unavailable to this court), 35 C.J. *Juries* sec. 10 (1924), and 50 C.J.S. *Juries* sec. 7 (1947). These latter two

authorities provide as follows (all footnotes have been omitted):

> [Sec. 10] 2. Number of Jurors. *The term "jury" when used without any qualification, addition, or prefix imports a body of twelve men.* This was the meaning of the term at common law, and, unless otherwise provided, constitutional provisions guaranteeing or preserving the right to trial by jury have uniformly been construed as contemplating a jury of this number. In some jurisdictions the constitutions expressly provide that a jury must in certain cases consist of twelve persons. In other jurisdictions the constitutions provide for a jury of less than twelve in certain cases, or in certain courts, or provide that the legislature may enact laws regulating the number of jurors, or may make such regulations with respect to certain courts; but, except in cases where this number has been changed by statute under the authority of such a provision or waived by the parties, it cannot be denied in any case where a jury trial is a constitutional right.

35 C.J. at 144-46 (emphasis added).

> Sec. 7.—Number of Jurors
>
> The term "jury" ordinarily imports a body of twelve men but constitutional provisions may provide for, or authorize the legislature to provide for, a jury of less than twelve in certain cases or in certain courts.
>
> *The term "jury," when used without any qualification, addition, or prefix, imports a body of twelve men. This was the meaning of the term at common law, and, unless otherwise provided, constitutional provisions guaranteeing or preserving the right to trial by jury have uniformly been construed as contemplating a jury of this number.* In some jurisdictions the constitutions expressly provide that the jury must in certain cases consist of twelve persons. In other jurisdictions the constitutions provide for a jury of

> less than twelve in certain cases, or in certain courts, or provide that the legislature may enact laws regulating the number of jurors, or may make such regulations with respect to certain courts; but, except in cases in which this number has been changed by statute under the authority of such a provision or waived by the parties, it cannot be denied in any case where a jury trial is a constitutional right, as discussed infra sec. 123.

50 C.J.S. at 720-21 (emphasis added).

Undoubtedly, *Jordan v. Crudington* accurately reflected the state of the law as it existed at the time that case was decided in 1950. We must now determine if the meaning of the term "jury" has changed since that time. Although in the instant case there is no claim that article 1970-166d violates the United States Constitution, in view of the fact that the court in *Jordan* relied upon authorities which interpreted generally the requirements concerning the composition of a "jury," in our search for the current meaning of that term we look for guidance to two United States Supreme Court cases that were decided subsequent to *Jordan.*

In 1970, the United States Supreme Court had the opportunity to address the issue of whether the guarantee of the sixth amendment of the United States Constitution of a trial by "jury" necessarily requires trial by exactly twelve persons, or whether a state law providing for trial by a six-person jury in a criminal case is constitutional. *See Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). After extensive discussion regarding the development of the right of trial by jury and the history of the traditional twelve-person jury, the Court upheld the state statute and stated:

> We conclude, in short, as we began: *the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.' Duncan v. Louisiana, supra,* 391 U.S. [145] at 182, 88 S.Ct. [1444] at 1466 [20 L.Ed.2d 491 (1968)] (Harlan, J., dissenting). To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions. . . . Our holding does no more than leave these considerations to Congress and the States unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number than can constitute a jury. Consistent with this holding, *we conclude that petitioner's Sixth Amendment rights,* as applied to the States through the Fourteenth Amendment, *were not violated by Florida's decision to provide a six-man rather than a 12-man jury.*

Id., 399 U.S. at 102-03, 90 S.Ct. at 1907, 26 L.Ed.2d at 461-62 (emphasis added).

Shortly thereafter, the Court was confronted with the issue of whether the seventh amendment of the United States Constitution, which provides that "In Suits at common law . . . the right of trial by jury shall be preserved . . . ," requires that a *civil* jury be composed of twelve members, and, therefore, whether a local federal rule of procedure providing that a jury in civil cases shall consist of six persons, was unconstitutional. *See Colgrove v. Battin,* 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973). Adhering to the reasoning in *Williams,* the Court concluded that a six-person jury satisfies the seventh amendment's guarantee of "trial by jury" in civil cases. *See*

Colgrove, 413 U.S. at 159-60, 93 S.Ct. at 2454, 37 L.Ed.2d at 530-31.

Somewhat surprisingly, there have not been any Texas cases since *Jordan* discussing whether a legislatively created court may have a six-person jury.[1] However, we discern no meaningful difference between the language of the United States Constitution guaranteeing the right to a "jury" trial in a criminal prosecution, the right of "trial by jury" in a suit at common law, and the guarantee of the Texas Constitution that "[t]he right of trial by jury shall remain inviolate." *Compare* U.S. CONST. amends. VI, VII *with* TEX. CONST. art. I, sec. 15. Therefore, inasmuch as the United States Supreme Court has determined that the term "jury" does not necessarily connote a body of twelve members under the United States Constitution, *see Williams,* 399 U.S. at 102-03, 90 S.Ct. at 1907, 26 L.Ed.2d at 461-62 and *Colgrove,* 413 U.S. at 159-60, 93 S.Ct. at 2454, 37 L.Ed.2d at 530-31, we find there is no Texas constitutional prohibition against the legislature providing that a county court at law may have a six-person jury. Accordingly, we hold that the provision in section 7(a) of article 1970-166d for a six-person jury does not violate the Texas Constitution.

We overrule appellant's second motion for rehearing.

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1. For a discussion of cases from other jurisdictions, *see* Annotation, *Statute Reducing Number of Jurors as Violative of Right to Trial by Jury,* 47 A.L.R.3d 895 (1973).

EXHIBIT D

IN THE COURT OF APPEALS
FOR THE SECOND COURT OF APPEALS DISTRICT

Rome Rutledge	)	
	)	
vs.	)	
	)	No. 2-85-178-CV
Ruth Rutledge	)	

ORDER

On this day came on to be heard the third motion of appellant, Rome Rutledge, for rehearing.

It is the opinion of this Court that said motion for rehearing should be and is hereby *overruled.* It is the order of this Court that the opinion and judgment of May 15, 1986, stand unchanged.

The Clerk of this Court is directed to transmit a copy of this Order to the attorneys of record.

It is so ordered.

SIGNED THIS 4th day of December, 1986.

/s/ John G. Hill
JOHN G. HILL
JUSTICE

OVRULE.CV

EXHIBIT E

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

February 25, 1987

Ms. Holly Crampton
Crampton, Crampton & Estrada
505 Lamar Avenue
Wichita Falls TX 76301

Mr. Stephen Briley
Banner, Dobbs & Briley
Suite 1200, Hamilton Building
Wichita Falls TX 76301

RE: Case No. C-6083

STYLE: ROME RUTLEDGE
v. RUTH RUTLEDGE

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ Blanca E. Morin, Deputy

EXHIBIT F

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk.
April 8, 1987

Ms. Holly Crampton
Crampton, Crampton & Estrada
505 Lamar Avenue
Wichita Falls TX 76301

Mr. Stephen Briley
Banner, Dobbs & Briley
Suite 1200, Hamilton Building
Wichita Falls TX 76301

RE: Case No. C-6083

STYLE: ROME RUTLEDGE
v. RUTH RUTLEDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

/s/ By Blanca E. Morin, Deputy

EXHIBIT G

Art. 1970-166d. County Court at Law of Wichita County

Creation

Section 1. The County Court at Law of Wichita County is created on the date determined by Section 10 of this Act.

Jurisdiction

Sec. 2. (a) The County Court at Law of Wichita County has jurisdiction concurrent with the County Court of Wichita County over all criminal and juvenile proceedings, original and appellate, prescribed by the constitution and general laws of this state for county courts, and prescribed by Chapter 762, Acts of the 61st Legislature, Regular Session, 1969, as amended (Article 1200aa, Vernon's Texas Civil Statutes), and by Chapter 519, Acts of the 63rd Legislature, Regular Session, 1973 (Article 1970-166c, Vernon's Texas Civil Statutes).

(b) The County Court at Law of Wichita County has civil jurisdiction concurrent with the district courts of Wichita County over civil suits, causes, and proceedings when the amount in controversy exceeds $500 and does not exceed $10,000, exclusive of interest, and, without regard to the value of the estate or matter in question, over suits, causes, and proceedings involving dissolution of marriage by divorce or annulment, including the adjustment of property rights, suits affecting the parent-child relationship, suits concerning adoptions, suits for protection of children in an emergency, suits for removal of disabilities of minority or for change of name, suits involving delin-

quent children or children in need of supervision, suits brought under the authority of the Uniform Reciprocal Enforcement of Support Act or the Uniform Interstate Compact on Juveniles and all other jurisdiction, powers, and authorities now or hereafter placed in the district or county courts under the juvenile or child welfare laws of this state.

(c) The County Court at Law of Wichita County has no jurisdiction other than that specifically set forth in this section. The concurrent civil jurisdiction granted to the County Court at Law of Wichita County does not include causes or proceedings, original or appellate, concerning eminent domain, roads, bridges and public highways, or the general administration of county business which is now within the jurisdiction of the commissioners court of Wichita County. The County Court at Law of Wichita County has jurisdiction concurrent with the County Court of Wichita County over probate and mental health proceedings during the absence of the county judge or the inability of the county judge to perform any of his duties relating to such proceedings. The absence or inability of the county judge shall be certified by the county judge or the commissioners court to the judge of the county court at law. When certification is for the purpose of conferring power to perform a judicial act, the certificate shall be spread on the minutes of the appropriate court. Notwithstanding the additional powers and duties conferred on the judge of the county court at law during the absence or inability of the county judge, no additional compensation or salary shall be paid to him, but the compensation or salary of the judge of the county court at law shall remain as fixed by law. The provisions of this sub-

section relating to the powers and duties of the judge of the county court at law during the absence or inability of the county judge do not repeal the law providing for the election or appointment of a special county judge but are cumulative of and in adidtion to all law providing for a special county judge.

(d) The County Court at Law of Wichita County and the duly qualified judge of the court have the power to issue writs and orders as may be necessary in aid of its jurisdiction or the enforcement of its lawful orders.

(e) The provisions of this section do not diminish the jurisdiction of the several district courts of Wichita County, and the district courts shall retain and continue to exercise the jurisdiction that they now have or that may be hereafter conferred upon them by law.

Terms

Sec. 3. The County Court at Law of Wichita County shall hold two continuous terms which commence on the first Monday in January and on the first Monday in July of each year. Each term of court continues until the next succeeding term begins.

Judge

Section 4. (a) The judge of the County Court at Law of Wichita County shall be at least 25 years of age and shall be a citizen of the United States and of this state who is licensed to practice law in this state, has been a practicing lawyer or a judge of a court in this state or both combined for four years, and has been a resident of Wichita County for two years. The judge shall reside in Wichita County during his or her term of office.

(b) During his or her term of office, the judge of the County Court at Law of Wichita County shall not engage in the private practice of law.

(c) When this court is created, the commissioners court of Wichita County shall appoint a judge of the County Court at Law of Wichita County, who shall serve until the next general election after he or she takes office and until his or her successor is duly elected and has qualified. Beginning at the general election in 1982 and every fourth year thereafter, there shall be elected by the qualified voters of Wichita County a judge of the county court at law for a regular term of four years as provided in Article V, Section 30, and Article XVI, Section 65, of the Texas Constitution.

(d) A vacancy occurring in the office of the judge of the County Court at Law of Wichita County shall be filled by the commissioners court of Wichita County, and the appointee shall hold office until the next general election and until his or her successor is elected and has qualified.

(e) The judge of the County Court at Law of Wichita County shall execute a bond and take the oath of office prescribed by law for county judges. The judge may be removed from office in the same manner and for the same causes as a county judge.

(f) The judge of the County Court at Law of Wichita County may receive a salary not to exceed 90 percent of the total annual salary paid to the judges of the district courts having jurisdiction in Wichita County to be set by the commissioners court and to be paid out of the county treasury by the commissioners court. The salary may be paid in equal monthly installments. The judge of the

County Court at Law of Wichita County may be entitled to traveling expenses and necessary office expenses, including administrative and clerical help, in the same manner as is allowed the county judge of Wichita County. The judge of the county court at law is a member of the Juvenile Board of Wichita County. The judge of the County Court at Law of Wichita County shall assess the same fees as are now prescribed or may be established by law relating to county judge's fees, all of which shall be collected by the clerk of the court and shall be paid into the county treasury on collection, and no part of which shall be paid to the judge.

(g) A special judge of the County Court at Law of Wichita County with the same qualifications as the regular judge may be appointed or elected in the manner provided by law for the appointment or election of a special county judge. If a judge of the County Court at Law of Wichita County is disqualified to try a case pending in his or her court, the parties or their attorneys may agree on the selection of a special judge for the case. A special judge is entitled to the same rate of compensation as the regular judge.

Personnel

Sec. 5. (a) The county attorney and sheriff of Wichita County shall serve as county attorney and sheriff, respectively, of the County Court at Law of Wichita County. The district clerk of Wichita County shall serve as clerk of the County Court at Law of Wichita County in cases enumerated in Subsection (b) of Section 2 of this Act, and the county clerk of Wichita County shall serve as clerk of the County Court at Law of Wichita County in cases enu-

merated in Subsection (a) of Section 2 of this Act. These officials, either personally or by the appointment of a deputy or assistant, shall perform the duties and responsibilities of their office and are entitled to the compensation, fees, and allowances prescribed by law for their respective offices. The commissioners court may employ as many deputy sheriffs and baliffs as are necessary to serve the court.

(b) The judge of the County Court at Law of Wichita County shall appoint an official court reporter who shall have the same qualifications and whose duties shall in every respect be the same as now provided by law. The official court reporter is entitled to the compensation fixed by the commissioners court of Wichita County.

Transfer of cases and judges

Sec. 6. (a) As soon as practicable after this court is created, the county clerk may establish a separate docket for the court created by this Act from among pending matters filed originally in the county court of Wichita County and shall transfer those matters to the docket of the court created by this Act. Equalization of case load shall be the primary object in establishing the initial case docket for the County Court at Law of Wichita County. As soon as practicable after this court is created, the district clerk shall establish a separate docket for the County Court at Law of Wichita County. The transfer of any pending matters originally filed in the district courts prior to the date the County Court at Law of Wichita County is created shall be in accordance with the provisions of Subsection (b) of this section.

(b) The judge of the county court and the judge of the county court at law may transfer cases to and from

the dockets of their respective courts, in matters within their jurisdiction, in order that the business may be equally distributed between them. All cases of concurrent jurisdiction enumerated in Subsection (b) of Section 2 of this Act may be instituted in or transferred between the district courts of Wichita County and the County Court at Law of Wichita County. However, no case may be transferred from one court to another without the consent of the judge of the court to which it is transferred, and no case may be transferred unless it is within the jurisdiction of the court to which it is transferred.

(c) In cases transferred to the county court at law as provided by Subsection (a) of this section and in cases transferred to any of the courts in Wichita County by order of the judge of another court, all processes, writs, bonds, recognizances, or other obligations issued or made in the cases shall be returned to and filed in the court to which the transfer is made. All bonds executed and recognizances entered into in those cases shall bind the parties for their appearance or to fulfill the obligations of the bonds or recognizances at the terms of the court to which the cases are transferred as are fixed by law. All processes issued or returned before transfer of the cases as well as all bonds and recognizances before taken in the cases shall be valid and binding as though originally issued out of the court to which the transfer is made.

(d) The county judge and the judge of the County Court at Law of Wichita County may freely exchange benches and courtrooms with each other in matters within their jurisdiction so that if one is ill, disqualified, or otherwise absent, the other may hold court for him or her with-

out the necessity of transferring the case involved. Either judge may hear all or any part of a case pending in the county court or county court at law, but only in matters within their jurisdiction, and may rule and enter orders on and continue, determine, or render judgment on all or any part of the case without the necessity of transferring it to his or her own docket. The district judges and the judge of the County Court at Law of Wichita County may freely exchange benches and courtrooms with each other in matters within their concurrent jurisdiction so that if one is ill, disqualified, or otherwise absent, another may hold court for him or her without the necessity of transferring the case involved. Any of those judges may hear all or any part of a case pending in the district court or county court at law, but only in matters within their jurisdiction, and may rule and enter orders on and continue, determine, or render judgment on all or any part of the case without the necessity of transferring it to his or her own docket. However, a judge may not sit or act in a case unless it is within the jurisdiction of his or her court. Each judgment and order shall be entered in the minutes of the court in which the case is pending. The provisions providing for the exchange of benches by and between the judges are cumulative of and in addition to the provisions herein provided for the selection and appointment of a special judge of the County Court at Law of Wichita County.

Practice and procedure

Sec. 7. (a) Practice in the County Court at Law of Wichita County shall conform to that prescribed by general law for county courts, except that practice and procedure, rules of evidence, issuance of process and writs,

and all other matters pertaining to the conduct of trials and hearings in the County Court at Law of Wichita County involving those matters of concurrent jurisdiction enumerated in Subsection (b) of Section 2 of this Act shall be governed by the provisions of this Act and the laws and rules pertaining to district courts, general and special, as well as county courts. If a case enumerated in Subsection (b) of Section 2 of this Act is tried before a jury, the jury shall be composed of six members and shall be privileged to render verdicts by a five to one margin in civil cases and unanimous verdict in criminal cases.

(b) The laws which govern the drawing, selection, service, and pay of jurors for county courts apply to the County Court at Law of Wichita County.

(c) Jurors regularly impaneled for a week by the district court or courts may, on request of either the county judge or the judge of the county court at law, be made available and shall serve for the week in either the county court or county court at law.

Courtroom

Sec. 8. The commissions court of Wichita County shall furnish and equip a suitable courtroom and office space for the court created by this Act.

Seal

Sec. 9. The seal of the court created by this Act shall be the same as that provided by law for county courts, except the seal shall contain the words "County Court at Law of Wichita County."

Date of creation

Sec. 10. The County Court at Law of Wichita County is created on January 1, 1982, or on a date determined by the commissioners court by an order entered on its minutes, after the provisions of Section 8 of this Act shall be fully complied with, whichever date is earlier.

Supreme Court, U.S.
FILED
AUG 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-72

In The
Supreme Court of the United States
October Term, 1986

ROME RUTLEDGE,

Petitioner,

v.

RUTH RUTLEDGE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

20 pp

QUESTIONS PRESENTED

This Honorable Court should deny Petitioner's application for Writ of Certiorari because:

(1) The State Court judgment presents no substantial federal question.

(2) Petitioner's application for Writ of Certiorari was filed solely to delay the enforcement of the State Court's judgment.

LIST OF INTERESTED PARTIES

(1) Rome Rutledge, Petitioner
Wichita Falls, Texas

(2) Ruth Rutledge, Respondent
Iowa Park, Texas

(3) Crampton, Crampton & Estrada
505 Lamar Street
Wichita Falls, Texas 76301
Attorneys for Petitioner

(4) Banner, Dobbs & Briley
1200 Hamilton Building
Wichita Falls, Texas 76301
Attorneys for Respondent

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STATEMENT OF THE CASE

This is a divorce case. On April 2, 1985, the trial court heard the case. A jury was expressly waived by both parties. On April 23, 1985, the County Court at Law for Wichita County, Texas, a Court created by Texas Statute, entered its decree granting a divorce and dividing the community property.

Petitioner appealed from such decree to the Court of Appeals for the Second Supreme Judicial District of Texas attacking the property division and the failure of the trial court to grant a new trial. Petitioner did not raise any issue concerning the trial court's jurisdiction. The Court of Appeals affirmed the trial court's decree.

Following the Court of Appeals affirmance, Petitioner filed a motion for rehearing which attacked the trial court's jurisdiction for the first time. Petitioner did not attack the jurisdiction of the trial court on the basis that it allowed juries to consist of six persons. The Court of Appeals denied this motion for rehearing. Petitioner then filed a second motion for rehearing and for the first time attacked the jurisdiction of the trial court on the basis that enabling legislation allowed for juries to consist of six persons. This second motion for rehearing was overruled by the Court of Appeals. Petitioner then filed a third motion for rehearing which was also denied.

Petitioner then filed an Application for Writ of Error to the Texas Supreme Court. The Texas Supreme Court refused to grant this Writ of Error noting "no reversible error."

———o———

REASON 1 WHY THE APPLICATION FOR CERTIORARI SHOULD BE DENIED

Restated

The State Court judgment presents no substantial federal question.

ARGUMENT UNDER #1

To grant certiorari in this case the Supreme Court must find that a substantial federal question exists. 28 U.S.C. 1257(3); Rule 17 of the Rules of the Supreme Court of the United States. If the State Court decided the case on non federal grounds, as here, this Court should not grant certiorari. Here, the Texas Courts decided this case by interpreting *Texas* law. By way of analogy, the Court of Appeals for the Second Supreme Judicial District of Texas cited United States Supreme Court cases that allowed federal juries to be composed of six persons in civil cases. However, the Texas Court of Appeals opinion did not cite such case as stare decisis but rather by analogy and authority.

Petitioner claims that Texas Constitution Article 5 Section 8 confers original exclusive jurisdiction over divorce cases upon its state district courts. This is not true. In *Jordan v. Crudgington*, 231 S.W. 2d 641 (Tex. 1950), the Texas Supreme Court held that the legislature may create statutory courts having jurisdiction over divorce cases without violating that constitutional provision.

Petitioner also claims the state constitution requires twelve person juries. The state constitution is silent as to what constitutes a jury. In 1950, the Texas Supreme

Court in *Jordan* held that a jury, as used in the Texas Constitution, consisted of twelve persons but cited no case authority for its holding. The Court of Appeals held that the Texas Constitution did not require twelve person juries in overruling Petitioner's second motion for rehearing. The Texas Supreme Court has apparently overruled *Jordan* when it refused Petitioner's Application for Writ of Error in this case. This holding is binding upon federal courts. See *Hortonville Dist. v. Hortonville Ed. Ass'n.*, 426 U. S. 482 (1976).

At any rate, Petitioner has not demonstrated in any manner how the State Court's refusal to hold that the trial court lacked jurisdiction on the basis of what constitutes a jury under the constitution has denied him due process. Such a claim is especially ludicrous given the fact that Petitioner waived a jury in this case. Furthermore, Petitioner has not demonstrated in any manner how he was denied equal protection by the refusal of the State Supreme Court to hold that the trial court lacked jurisdiction. He has not demonstrated that he belongs to any special class that was prejudiced by the trial court's ruling. In short, Petitioner simply makes a naked assertion that the Supreme Court's judgment violates the 14th Amendment to confer a federal aura on this case which only involves an interpretation of State Law. Petitioner's reliance upon *Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Paul v. Davis*, 424 U.S. 693 (1976) is entirely misplaced. Both of those cases were actions arising under Federal Law, specifically 42 U.S.C. 1983. Here, Petitioner never raised any claim of federal involvement until after the Court of Appeals affirmed the trial court's property division.

REASON 2 WHY THE APPLICATION FOR CERTIORARI SHOULD BE DENIED

Restated

Petitioner's Application for Writ of Certiorari was filed solely to delay the enforcement of the State Court's judgment.

———o———

ARGUMENT UNDER #2

Petitioner *never* raised a jurisdictional objection at the trial level or on initial appeal. As an after thought, following the Texas Court of Appeals' affirmance of the trial court's granting a divorce and dividing community property, Petitioner, for the first time, raised jurisdictional attacks based on the "jury" issue, even though Petitioner had not requested a jury at the trial level and had affirmatively placed all questions of law and fact before the trial court, expressly waiving a jury. This jurisdictional attack was raised solely as a vehicle by which Petitioner could frivolously seek a review by this Court in an effort to delay compliance with the trial court's order, which obligated Petitioner to turn over certain items of community property.

Following the Texas Supreme Court's refusal to grant a Writ of Error in this case Respondent filed in the trial court a motion to compel Petitioner to comply with the specific terms of the divorce decree. In response to this motion Petitioner filed a Plea In Abatement claiming that the divorce decree was as yet unenforceable because Peti-

tioner intended to file an Application for Writ of Certiorari with this Court. Attached to that response is an affidavit by Petitioner's attorney, Holly Crampton, that states that Petitioner intended to seek a review of the case by the United States Supreme Court even before the case was submitted to the Texas Supreme Court! Thus, it is apparent that Petitioner is engaged in a war of attrition with his ex-wife seeking to delay until the very last moment of time his compliance with the trial court's decree. Further evidence of these dilatory tactics is shown by the fact that Petitioner filed three motions for rehearing in the Court of Appeals and one motion for rehearing in the Texas Supreme Court.

Petitioner's sole intent in filing this Application for Writ of Certiorari is to deprive Respondent of the property lawfully granted to her in the trial court's decree of divorce.

—o—

CONCLUSION

This is a controversy turning on the interpretation of Texas Law and does not involve any issue arising under the federal constitution. It is simply another effort by Petitioner to avoid the trial court's judgment. Respondent respectfully prays that the Application for Writ of Certiorari be and all things denied.

Respectfully submitted,

JACK BANNER
BANNER, DOBBS & BRILEY
1200 Hamilton Building
Wichita Falls, Texas 76301
(817) 723-6644

Attorneys for Respondent
Ruth Rutledge

APPENDIX

EXHIBIT A

NO. CCL-377-84

IN THE MATTER OF THE MARRIAGE OF	)	IN THE COUNTY COURT AT LAW
	)	OF
RUTH RUTLEDGE AND ROME RUTLEDGE	)	WICHITA COUNTY, TEXAS

MOTION FOR CONTEMPT, MOTION TO COMPEL EXECUTION OF DOCUMENTS AND MOTION FOR JUDGMENT FOR FAILURE TO DELIVER CERTAIN MONIES

(Filed April 23, 1987)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Ruth Rutledge, Movant, and requests the Court to enforce by contempt a prior order entered in this cause, order the Respondent to execute certain specific instruments and to grant a judgment in favor of Movant for the failure of Respondent to turn over certain monies as required by this Court's previous order and for such request would show the Court the following:

I. On April 23, 1985, this Court entered a final decree of divorce, which appears of record in Volume 11, Pages 1158 through 1247, of the minutes of this Court, that states in relevant part as follows:

It is ordered and decreed that Respondent, Rome Rutledge, shall appear in the law offices of Fillmore, Purtle

& Spurgers at Wichita Falls, Texas, at 2:00 P.M. on April 26, 1985, and shall execute, have acknowledged, and delivered to Petitioner, Ruth Rutledge, the following instruments:

1. A special warranty deed in the form attached to this Decree of Divorce as Exhibit 13 transferring Respondent's interest in the ranch at Iowa Park, Texas to Petitioner:
2. Assignments of overriding royalty interest in the form attached to this Decree of Divorce as Exhibits 14-18, transferring his interest in the royalty interest to Petitioner;
3. Certificates of Title to the following motor vehicles:
   a. 1983 Cadillac Eldorado
   b. 1980 Chevrolet pickup truck
   c. 1965 pickup truck
   d. 1978 4-wheel drive pickup
   e. Winch truck
4. A check drawn on the MBank Wichita Falls, N. A. account containing the approximately $225,000.00 that the Court has previously ordered Respondent to deposit in such account, in the amount of $60,500.00 payable to Ruth Rutledge.
5. Any and all other documents necessary to effect this decree.

Movant is Petitioner and Respondent is Respondent in the above described order.

II. Respondent has disobeyed the order as follows:

   a. Respondent failed to appear at the offices of Fillmore, Purtle & Spurgers at Wichita Falls, Texas at 2:00 P. M. on April 26, 1985, and

failed to execute the special warranty deed described as Exhibit 13 attached to the final decree of divorce;

b. Respondent failed to appear at the law offices of Fillmore, Purtle & Spurgers at Wichita Falls, Texas at 2:00 P. M. on April 26, 1985 and failed to execute the assignments of overriding royalty interest in the form attached to the decree of divorce as Exhibit 14-18 transferring Respondent's interest in the royalty interest to Petitioner;

c. Respondent failed to appear at the law offices of Fillmore, Purtle & Spurgers at Wichita Falls, Texas at 2:00 P. M. on April 26, 1985 and failed to execute the certificates of titles to the following motor vehicles:

1983 Cadillac Eldorado
1980 Chevrolet pickup truck
1965 pickup truck
1978 4-wheel drive pickup
Winch truck

d. Respondent failed to appear at the offices of Fillmore, Purtle & Spurgers at Wichita Falls, Texas at 2:00 P. M. on April 26, 1985 and failed to deliver a check in the amount of $60,500.00.

III. In its final decree of divorce this Court awarded movant the property described as Exhibit A attached to this motion.

The Court also ordered the Respondent to execute any and all other documents necessary to effect this decree. Attached to this motion and identified as Exhibit B are transfer orders required by Forest Oil Company, the company purchasing the oil from the oil lease described above, to transfer royalty payments to Movant. Movant requests

the Court to issue a clarifying order directing Respondent to execute the original of these documents within a reasonable time so that Movant may receive the royalty she is entitled. Movant further requests the Court to enter an order holding Respondent in contempt of Court if he refuses to execute such documents.

IV. In its final decree of divorce this Court awarded Movant the sum of $60,500.00 out of a specific account. Movant requests the Court to hold Respondent in civil and criminal contempt of Court for failing to deliver such amount as alleged above. Respondent requests the Court to order the Respondent to be confined in the county jail of Wichita County Texas for six months and for an additional period of time until Respondent purges himself of contempt by complying with the Court's previous orders.

V. In the event the Court feels that any of the above referenced orders contained in the final decree of divorce are not specific enough to be enforced by contempt, Movant requests the Court to enter a clarifying order directing the Respondent to execute the documents transferring Respondents interest in the property described in Exhibits 13 through 18 attached to the original decree of divorce, the certificates of titles to the motor vehicles described above and to order the Respondent to deliver the sum of $60,500.00 to Movant.

VI. Respondent, Rome Rutledge, has failed to pay $60,500.00 from the specific account of MBank Wichita Falls, N.A., as ordered by this Court. Petitioner seeks a judgement from this Court against Respondent pursuant to V.T.C.A. Family Code, Section 3.74, for the $60,500.00 plus pre-judgment interest and post judgment interest. Petitioner further requests the Court to rule that such

sum was held in trust or constructive trust for Petitioner's benefit. Petitioner further requests damages for the failure of Respondents to so deliver such monies.

VII. It was necessary to secure the services of Stephen Briley, a licensed attorney, to enforce and protect the rights of Movant and Respondent should be ordered to pay a reasonable attorney's fees, and a judgment plus interest should be rendered in favor of this attorney and against Respondent; or in the alternative such reasonable attorney's fees should be taxed as cost and ordered to be paid directly to the undersigned attorney.

VIII. Movant would show it is necessary to appoint an alternate process server. Prior motions to enforce the Court's decree have been placed with Mr. Mark Brewer constable in and for Wichita County, Texas. As shown by his affidavit attached hereto he has been unable to serve such motions. Movant requests the Court to appoint a disinterested adult to serve this motion.

PRAYER

Movant prays that the Court enter an order appointing an alternate method of service as requested herein and that Respondent be cited to appear herein. Movant prays that Respondent be held in contempt for disobedience of this Court's order as alleged herein and that punishment be fixed at a fine of not more than $500.00 or confinement in the county jail for not more than six months and continue thereafter until the Respondent complies with the order of the Court as alleged herein. Movant prays for

a money judgment as alleged and requested in this motion. Movant prays for attorney's fees as herein alleged.

Respectfully submitted,

BANNER, DOBBS & BRILEY
1200 Hamilton Building
Wichita Falls, Texas 76301
817/723-6644

BY: /s/ Stephen Briley
Stephen Briley
State Bar No. 02993600

THE STATE OF TEXAS
COUNTY OF WICHITA

The undersigned states under oath:

"I am Movant in the foregoing motion for contempt. I have personal knowledge of the facts and allegations stated in it and they are true and correct."

/s/ Ruth Rutledge
Ruth Rutledge, Affiant

THE STATE OF TEXAS
COUNTY OF WICHITA

SIGNED UNDER OATH BEFORE ME on the 22 day of April, 1987.

/s/ Marian S. Parks
Notary Public, State of Texas
My Commission Expires 1-24-89

SEAL

EXHIBIT B

NO. CCL-377-84

IN THE MATTER OF	)	IN THE COUNTY
THE MARRIAGE OF	)	COURT AT LAW
	)	OF
RUTH RUTLEDGE	)	WICHITA
AND	)	COUNTY,
ROME RUTLEDGE	)	TEXAS

PLEA IN ABATEMENT

(Filed May 14, 1987)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Rome Rutledge by and through his attorney of record, and would show the Court that the Motion for Contempt, Motion to Compel Execution of Documents and Motion for Judgment for Failure to Deliver Certain Monies should be abated, and in support of this Plea would show the Court the following:

In 1983 the Texas Legislature enacted Subchapter D to Chapter 3 of the Texas Family Code. Specifically, subchapter D addresses the questions involving enforcement of divorce decree.

> § 3.71(a) provides that "Further orders may be entered to enforce the division, but these orders shall be limited to orders in aid of or in clarification of the prior order."
>
> § 3.71(c) states "The power of the court to enter further orders to aid or clarify the property division is abated during the pendency of *any* appellate proceedings." (emphasis ours)

While this case has completed the Texas appellate process, it is being appealed by Writ of Certiorari to the United States Supreme Court. The time period in which to petition for certiorari in a civil case is governed by Rule 20 of the Rules of the Supreme Court and 28 U.S.C. § 2101(c) which provides:

> (c) Any other appeal on any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . .

Because the Petition for Certiorari must be professionally printed and the form must be strictly adherred to, counsel for Rome Rutledge does not expect to be able to file the Petition for Certiorari before the end of May, 1987, which is a period of time significantly less than the 90 days given by law within which to file.

The decision to take this case to the United States Supreme Court if necessary was made in the summer of 1986 by Rome Rutledge and this counsel following the Opinion by the Court of Appeals being handed down.

The provisions of the family code § 3.71 are specific and control in matters involving enforcement of a divorce decree over general provisions of the law. § 3.71(c) is not limited to State court appellate proceedings, nor is a supercedeas bond require, nor is there any reference to whether the mandate has come down or not.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Rome Rutledge prays that the Court abate the said Motion for Contempt, Motion to Compel Execution and Documents

and Motion for Judgment for Failure to Deliver Certain Monies until the conclusion of the federal court appellate process.

Respectfully submitted,

CRAMPTON, CRAMPTON & ESTRADA

By: Holly Crampton
State Bar No. 05004500
505 Lamar
Wichita Falls, Texas 76301
(817) 723-9746

Attorneys for Rome Rutledge

STATE OF TEXAS)
)
COUNTY OF WICHITA)

BEFORE ME, the undersigned authority, on this day personally appeared Holly Crampton, who, being duly sworn, on her oath, deposed as follows:

My name is Holly Crampton, and I am the attorney of record for Rome Rutledge.

On April 8, 1987, the Supreme Court of Texas overruled Mr. Rutledge's Motion for Rehearing.

Mr. Rutledge and I agreed in the summer of 1986 to take this case to the United States Supreme Court if it was not overturned in the State appeals process.

We have preserved an important federal question to present to the United States Supreme Court arising out of the application of federal law to this case by the Court of Appeals which restricts the greater rights of Texas citizens specifically enunmerated in the Texas Constitution.

Our law firm expects to file Mr. Rutledge's Petition for Certiorari to the United States Supreme Court no later than Monday, June 1, 1987.

Further Affiant sayeth not.

/s/ Holly Crampton

SIGNED AND SUBSCRIBED BEFORE ME this 14th day of May, 1987.

/s/ Betsy Gurganus
Notary Public, State of Texas

My Commission Expires: 10-25-89

(SEAL)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Plea in Abatement was hand delivered to Mr. Stephen Briley, Banner, Dobbs & Briley, Suite 1200 Hamilton Building, Wichita Falls, Texas 76301, on this 14th day of May, 1987.

/s/ Holly Crampton